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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061951
Party	Defendant Great Concepts, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

CHUTTER, INC.,)	
)	
Petitioner,)	CANCELLATION NO. 92061951
)	
v.)	
)	
GREAT CONCEPTS, LLC,)	
)	
<u>Registrant.</u>)	

**GREAT CONCEPTS, LLC’S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS
CHUTTER, INC.’S PETITION TO CANCEL UNDER FED.R.CIV.P. 12(b)(6)**

Registrant Great Concepts, LLC (“Registrant”) respectfully submits the following reply brief to Petitioner Chutter, Inc.’s (“Petitioner”) brief in opposition (“Petitioner’s Opposition”) to Registrant’s motion to dismiss the Petition to Cancel Registration No. 2,929,764 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

After failing to present sufficient facts to support a claim of fraud in its petition to cancel, Petitioner’s Opposition brief fails to directly address the points raised in Registrant’s motion to dismiss. Although some of the allegations in the Petition to Cancel might have been “consistent” with the elements for a claim of fraud, Petitioner’s Opposition does not show how these bare allegations could form the basis of a “plausible” case. Petitioner did not allege that the Declaration was made “willfully in bad faith,” nor has it disputed that it alleged facts that are actually *inconsistent* with such an allegation. Additionally, despite Petitioner’s suggestion to the contrary, there is no statutory basis for cancelling a Registration on the basis of a fraudulent Section 15 affidavit for incontestability, so the allegedly false Declaration could not be material to the present petition to cancel. Finally, Petitioner’s claim is precluded by the doctrine of res judicata since a dismissal with prejudice is an adjudication “on the merits,” and Petitioner “could have raised” its current claim in the Prior Cancellation Proceeding when it had at least constructive or inquiry notice of the public records of the Registration it was actively seeking to

cancel. As a result, Registrant requests that the Board dismiss the present petition to cancel.¹

II. PETITIONER STILL HAS NOT SUFFICIENTLY ALLEGED PLAUSIBLE FACTS TO SUPPORT A CLAIM FOR FRAUD.

A. Petitioner Has Only Pled Facts Showing the Declaration Was Incorrect; There Are No Plausible Allegations Showing That It Was Made in Willful Bad Faith.

Presenting the “five Ws” generically may be suitable for journalism, but a cause of action for fraud requires a heightened pleading standard. *See* Fed. R. Civ. P. 9(b). While the intent to deceive element may be alleged generally, a plaintiff must still state the circumstances constituting fraud with particularity. *Id.* Moreover, the pleading stage requires “allegations plausibly suggesting (not merely consistent with)” fraud in order to “possess enough heft to show that the pleader is entitled to relief.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 557 (2007) (internal quotations omitted). Much like how an allegation of parallel conduct got a complaint “close” to stating a claim for conspiracy in *Twombly*, a bare allegation of a knowingly false affidavit “without some further factual enhancement” prevents the petition to cancel from reaching “the line between possibility and plausibility of entitlement to relief” for a fraud claim. *See id.* (internal quotations omitted).

Here, Petitioner’s allegations are at most “merely consistent with” a claim of fraud, since Petitioner has not alleged any facts plausibly showing how the Declaration was made “willfully in bad faith.” *See id.*; *Crown Wallcovering Corp. v. The Wall Paper Manufacturers Ltd.*, 188 U.S.P.Q. 141, at *4 (TTAB 1975). More likely, however, Petitioner’s allegations are actually *inconsistent* with a claim of fraud, since Petitioner alleges that the declarant subsequently “filed with the Trademark Trial and Appeal Board a request to resume the Prior Cancellation Proceeding” only months after he submitted the Declaration. *See* Petition to Cancel, ¶¶18, 22, 35. In effect, Petitioner is asserting that the declarant “intended to deceive” the USPTO by declaring that there were no proceedings pending, only to undercut his own deception by

¹ As noted by Petitioner, “[e]very motion must be submitted in written form and ... shall contain a full statement of the grounds, and shall *embody* or be accompanied by a brief.” Trademark Rule 2.127(a) (emphasis added). Registrant’s previous submission clearly was a motion to dismiss containing a full statement of the grounds in its opening paragraphs: “Pursuant to Federal Rule of Civil Procedure 12(b)(6), Registrant Great Concepts, LLC ... moves [to] dismiss Petitioner Chutter, Inc.’s ... Petition to Cancel..., because [of the following grounds].” The ensuing brief was “embodied” in the motion to dismiss. Petitioner’s carping that the title of the motion to dismiss also included the words “memorandum of points and authorities” only serves to exalt form over substance.

updating the USPTO regarding those exact pending proceedings. *See id.* This is not a plausible factual scenario for pleading the “willfully in bad faith” element of a fraud claim.

B. **THE STATEMENT IN THE SECTION 15 AFFIDAVIT ON INCONTESTABILITY COULD NOT HAVE BEEN MATERIAL TO THE CONTINUED REGISTRATION STATUS UNDER SECTION 8.**

Petitioner also fails to allege how a false statement regarding the Registration’s *right to incontestability* could plausibly be material to the mark’s *registration status*. The only allegedly false statement pertained to the Section 15 affidavit for incontestability, but contrary Petitioner’s suggestion, there are no statutory grounds to cancel a registration for a fraudulent Section 15 affidavit. Petition to Cancel, ¶28; Petitioner’s Opposition, pp. 6-7. Lanham Act Section 14(3) permits “cancellation” of a registration if the “*registration* was obtained fraudulently.” 15 U.S.C. § 1064(3) (emphasis added). By contrast, Lanham Act Section 33(b)(1) establishes a “defense or defect” to the right of incontestability when it is proven that “the registration or the *incontestable right* to use the mark was obtained fraudulently.” 15 U.S.C. § 1115(b)(1) (emphasis added). Given this statutory scheme, renowned trademark scholar J. Thomas McCarthy states:

In the author's opinion, fraud in a § 15 incontestability affidavit should only serve to ***eliminate the incontestable status*** of the registration and ***not result in cancellation*** of the registration as such. If a “defect” is proven, the registration itself is not destroyed. The different language of § 14(3) and § 33(b)(1) would seem to dictate this result. While § 8 and § 9 affidavits go to the continuance of the registration itself, § 15 does not.

6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 31:80 (4th ed. 2015) (emphasis added) (footnote omitted). As a result, an allegedly fraudulent Section 15 affidavit does not provide grounds for cancellation of the registration.

It is important to recognize that a Combined Declaration under Section 8 and Section 15 has two components, each with its own purposes, requirements, and consequences. Indeed, the Board must “consider the purpose for which the false affidavit was filed in order to determine the importance of the untrue allegations.” *Duffy-Mott Co. v. Cumberland Packing Co.*, 424 F.2d 1095, 1099 (C.C.P.A. 1970). The purpose of a Section 8 affidavit of continued use is “to remove from the register automatically marks which are no longer in use.” *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 887 (C.C.P.A. 1969). A Section 15 affidavit of incontestability,

on the other hand, simply provides “conclusive evidence of the registrant's exclusive right to use the registered mark.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 192 (1985) (citing 15 U. S. C. § 1115(b)). “[I]t is in the public interest to maintain registrations of technically good trademarks on the register so long as they are still in use.” *In re Bose Corp.*, 580 F.3d 1240, 1247 (Fed. Cir. 2009) (quoting *Morehouse*, 407 F.2d at 888). Because “practically all of the user’s substantive trademark rights derive” from continuing use, “nothing is to be gained from and no public purpose is served by cancelling the registration of” a trademark that is still in use. *Id.*

Importantly, the required contents of the Section 8 and Section 15 affidavits differ significantly. The Section 8 affidavit must include: (i) a statement that the registered mark “is in use in commerce;” (ii) a list of the goods or services recited in the registration on or in connection with which the mark is in use; and (iii) one specimen per class of goods or services. *See* 15 U.S.C. § 1058(b)(1). The Section 15 affidavit, on the other hand, must state that: (i) the mark has been in continuous use in commerce for a period of five years since the registration was obtained and is still “in use in commerce;” (ii) there has been no final decision adverse to the owner's claim of ownership of the mark, right to register the mark, or to keep the mark on the register; and (iii) there is no proceeding involving the claimed rights pending in the USPTO or in the courts. *See* 15 U.S.C. § 1065. Thus, the only overlapping requirement between the two affidavits is the “in use in commerce” requirement.

Lastly, the consequences of not filing either one of the affidavits differ. The failure to file a Section 8 affidavit clearly results in the cancellation of the registration. 15 U.S.C. § 1058(a). The filing of a Section 15 affidavit, however, is “not a question of maintaining the registration in force, which can be done by an affidavit under section 8(a).” *Duffy-Mott*, 424 F.2d at 1099. The Lanham Act “does not require any registrant to file an affidavit under Section 15 on pain of losing rights to a mark; such a filing is entirely optional.” *Revco D.S., Inc. v. Parfums Stern-Val, Inc.*, No. 87 CIV. 2082 (MBM), 1988 WL 89061, at *7 (S.D.N.Y. 1988); T.M.E.P. § 1605. “An eligible registrant may choose to claim the benefits of incontestability and file an appropriate affidavit, or may elect to retain the registration without those benefits. The requirements for maintaining and renewing a federal registration are not affected.” T.M.E.P. §

1605.

Consequently, the remedy that Petitioner seeks for an allegedly fraudulent Section 15 affidavit of incontestability far outstrips any right that was afforded by the affidavit. To be sure, a fraudulent Section 15 affidavit may be sanctionable, but the sanction must be commensurate with the right that was allegedly obtained fraudulently. Petitioner relies on *Crown Wallcovering* to argue that a fraudulent Section 15 declaration constitutes grounds for cancellation, but that case was factually distinguishable from the present case. Opposition at p. 7. Although the Board did state in *Crown Wallcovering* that “that the filing of a fraudulent Section 15 affidavit constitutes a ground for cancelation,” the fraud alleged in that case was limited to the “use” requirement of Section 15 (i.e., the requirement overlapping Section 8), as opposed to the no pending proceedings requirement that is unique to Section 15. *See Crown Wallcovering*, 188 U.S.P.Q. 141 at *1, 4 (TTAB 1975) (“the application contained an averment that ‘The mark is claimed to have become distinctive ... through ... continuous use’; but that the mark was not in fact in continuous use...”).² Indeed, if a mark is not “still in use” as required for a Section 15 affidavit for incontestability, it inherently cannot be “in use” as is required for a Section 8 affidavit for continuing use. *See* 15 U.S.C. §§ 1058, 1065. Thus, a fraudulent averment for the “use” requirement of the Section 15 affidavit would have the same effect as a fraudulent Section 8 affidavit, which justifies the Board’s conclusion in *Crown Wallcovering* that a fraudulent Section 15 affidavit is a ground for cancellation. But the conclusion in that case should not necessarily extend to Section 15’s unique requirement that there be no pending proceedings involving the mark. Such an extension would be contrary to the express language used in language of § 14(3) and § 33(b)(1). *See* 15 U.S.C. §§ 1064(3), 1115(b)(1).

² In fact, each of the cases the Board relied upon in its *Crown Wallcovering* opinion related to the “maintenance” or “renewal” of a registration (rather than obtaining the right of incontestability), and the cases alleged fraud only regarding the “use” requirement (rather than the no pending proceedings requirement unique to Section 15). *See Volkswagenwerk Aktiengesellschaft v. Advance Welding and Mfg. Corp.*, 184 U.S.P.Q. 367 at *2 (TTAB 1974) (“[F]raud in the execution of affidavits or other documents attendant upon the *maintaining* of a registration rather than the securing thereof constitutes a ground for the cancelation”) (emphasis added); *G. B. Kent & Sons Ltd. v. Colonial Chemical Corporation*, 162 U.S.P.Q. 557 at *2 (TTAB 1969) (“[A]n affidavit which accompanied the application for *renewal* of opposer’s registration ... stated that the mark ‘shown therein is *in use* ...’ constituted a fraud”) (emphasis added); *Conwood Corporation v. Loew’s Theatres, Inc.*, 173 U.S.P.Q. 829 at *2 (TTAB 1972) (“[T]he affidavit which accompanied the application for *renewal* of respondent’s registration, i.e., that the mark ... is ‘still *in use* ...’ was false”) (emphasis added); *Duffy-Mott Co. v. Cumberland Packing Co.*, 424 F.2d 1095, 1097 (C.C.P.A. 1970) (“To *maintain* that registration in force, the then owner ... filed the usual combined affidavit under Sections 8 and 15 ... stating that the mark was then and had been *in continuous use*”) (emphasis added).

Finally, Petitioner has still not shown how Registrant's registration status would have differed if the Declaration had accurately stated that there were pending proceedings or if the Declaration had been filed at a later point in time when there no longer were pending proceedings. Petitioner belittles these "hypothetical" scenarios as being "irrelevant" to the "declarant's intent," but Petitioner misses the point: these hypotheticals are entirely relevant to the *materiality* of the declaration. *See* Petitioner's Opposition, pp. 7-8. In fact, the Board must determine whether the allegedly false statement was one that "*would have* resulted in the disallowance of the registration sought or to be maintained." *Smith Int'l, Inc. v. Olin Corporation*, 209 U.S.P.Q. 1033 at *7 (TTAB 1981) (emphasis added). Neither the Petition to Cancel nor Petitioner's Opposition provide any plausible allegations that the Board "would have resulted in the disallowance of the registration" if the Declaration acknowledged that there were proceedings pending. Nor do the Petition to Cancel or Petitioner's Opposition provide any plausible allegations that the Board "would have resulted in the disallowance of the registration" if the Declaration had been filed at a later point in time when there were no longer pending proceedings.

Petitioner also conveniently neglected to inform this Board that the litigation at issue was wholly resolved in the Registrant's favor. In a published decision, the Eleventh Circuit confirmed that there was no likelihood of confusion between Petitioner's common law mark and the Registrant's mark.³ The trademark here never had an adverse status, and this was confirmed by the Eleventh Circuit. As a result of all of the foregoing, Petitioner has failed to sufficiently plead that the allegedly false statement in the Declaration was material.

III. BECAUSE OF PETITIONER'S "APPARENT LOSS OF INTEREST" IN RAISING A CLAIM FOR WHICH IT HAD NOTICE IN THE PRIOR CANCELLATION PROCEEDING, THE CLAIM IS PRECLUDED HERE.

Petitioner does not dispute that the parties or their privities are the same between the Prior Cancellation Proceeding and the present cancellation proceeding. Nor does Petitioner dispute that the Prior Cancellation Proceeding resulted in a dismissal with prejudice based on Petitioner's failure to respond to the Board's order to show cause and Petitioner's "apparent loss of interest." Petition to Cancel, ¶19; *see also* Cancellation No. 92045947, TTABVUE No. 45.

³ *See, Tana v. Dantanna's*, 611 F.3d 767 (11th Cir. 2010).

Instead, Petitioner claims without support that its Prior Cancellation Proceeding was dismissed only on “procedural grounds” and never adjudicated on the merits (Petitioner’s Opposition, p. 12). However, Federal Circuit and Board precedent clearly hold that there is no requirement for the actual litigation of issues for claim preclusion, which instead operates by virtue of a final judgment, including by default, consent, or dismissal with prejudice. *Young Engineers v. US Intern. Trade Com’n*, 721 F.2d 1305, 1314 (Fed. Cir. 1983); *The Urock Network, LLC v. Umberto Sulpasso*, 115 U.S.P.Q.2d 1409, at *4 (TTAB 2015) (“Notwithstanding [Petitioner’s] contention that claim preclusion is inapplicable here because the prior proceeding was ended by a ‘technical procedure,’ whether the judgment in the prior proceeding was the result of a dismissal with prejudice or even default, for claim preclusion purposes, it is a final judgment on the merits.”). Therefore, since it is undisputed that the Prior Cancellation Proceeding was dismissed with prejudice based on Petitioner’s “apparent loss of interest,” the “final judgment on the merits” element of res judicata is clearly met.

Additionally, Petitioner disputes that the Prior Cancellation Proceeding involved the same transactional facts as the present proceeding, even though: (i) both were petitions to cancel Registrant’s Registration No. 2,929,764 for the mark DANTANNA’s for restaurant services; (ii) in which Petitioner claimed damages to its own DAN TANA’S mark for restaurant services; (iii) resulting from the USPTO’s issuing Office Actions refusing Petitioner’s applications to register its mark because of a likelihood of confusion with Registrant’s mark under § 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). *See* Cancellation No. 92045847, TTABVUE No. 1, p. 1-2; Petition to Cancel, p. 1-3.⁴ Thus, the subject and prayer for relief of the petitions are the same, the claimed damages are the same, and the cause of the damages are the same. *Id.* These compose the same core or nucleus of operative facts, notwithstanding Petitioner’s attempt to distinguish its second petition to cancel by pointing to its new ground of fraud, which it could have raised in the first petition to cancel.

Contrary to the Petitioner’s suggestion, neither the specific ground of fraud nor the

⁴ Moreover, Petitioner repeatedly notes that both the Prior Cancellation Proceeding and the Civil Action involved “Registrant’s right to register and use the mark DANTANNA’S for restaurant services” and “Registrant’s right to register and use the mark that is the subject of the Registration and to keep the mark on the register.” Petition to Cancel, ¶¶ 10, 26, 27, 32. This is again the subject of the present cancellation proceeding.

specific facts on which the claim is based need to have been actually raised in the Prior Cancellation Proceeding. Rather, “[t]his bar extends to relitigation of ‘claims that were raised *or could have been raised*’ in an earlier action. *The Urock Network*, 115 U.S.P.Q.2d 1409, at *4 (TTAB 2015) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984)) (emphasis in original). Thus, “[c]laim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.” *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000). While the Board and the Federal Circuit recognize that an infringement action in district court generally differs from a cancellation proceeding before the Board for claim preclusion purposes, such a distinction does not exist if a plaintiff’s two actions shared a common basis and pursued the same prayer for relief to prevent the defendant’s ability to register its mark. *Sharp Kabushiki Kaisha a/k/a Sharp Corp.*, 91154103, 2012 WL 2930648, at *2-3 (TTAB 2012) (contrasting *Jet*, 223 F.3d at 1364).

As recognized by Petitioner, the Federal Circuit is guided by the Restatement (Second) of Judgments in determining whether a plaintiff’s claim in a particular case is barred by claim preclusion. *The Urock Network*, 115 U.S.P.Q.2d 1409, at *5 (TTAB 2015); *Young Engineers*, 721 F.2d at 1314. The Restatement provides that:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar . . . the claim extinguished includes ***all rights*** of the plaintiff to remedies against the defendant ***with respect to all or any part of the transaction, or series of connected transactions***, out of which the action arose.

(2) What factual grouping constitutes a “transaction”, and what grouping constitutes a “series”, are to be ***determined pragmatically***, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.

Id. (emphasis added). Although Petitioner stresses the fact that it is bringing a different “cause of action” in the present petition to cancel, the “*Restatement* speaks in terms of *claims* and does not make reference to ‘causes of action,’” since “generally, reference to a ‘cause of action’ in this

connection leads to consideration of what have come to be regarded as irrelevant matters.” *Young Engineers*, 721 F.2d at 1314 n.6 (emphasis in original). For instance, a party may be precluded from bringing a petition to cancel on the theory or cause of action of abandonment even when its earlier petition to cancel was based on a theory or cause of action for fraud. *See Vitaline Corp. v. Gen. Mills, Inc.*, 891 F.2d 273, 275 (Fed. Cir. 1989).

The facts of this case closely resemble those in *S Industries, Inc. and Central Mfg. Co. v. Covington Industries, Inc.*, in which the Board precluded a petition to cancel on the grounds of fraud and abandonment that “could have been brought together” with a previous petition to cancel on the ground of likelihood of confusion under Section 2(d). *S Industries, Inc. and Central Mfg. Co. v. Covington Industries, Inc.* 69, 2002 WL 31651761, at *5 (TTAB 2002). The Board concluded that the claims in these two petitions were “the same” since “[b]oth petitions seek the same relief (the cancellation of the same registration) for at least overlapping reasons (petitioner is the owner of the same registration and that petitioner will be damaged by the continuing presence of that registration on the register).” *Id.* Although the Board in *S Industries* ultimately precluded only the abandonment claim and not the fraud claim, this was because the petitioner “could not have” raised the fraud claim in the first cancellation action since it was based on an affidavit submitted on December 9, 1994, *i.e.*, well **after** the first cancellation was dismissed with prejudice on April 28, 1993. *See S Indus., Inc.*, 69, 2002 WL 31651761, at *5, 8 (TTAB 2002); *see also* Section 8 and 15 Affidavit for Registration No. 1,516,448.⁵

Here, however, Petitioner easily “could have raised” the fraud claim at issue in the present Petition to Cancel well before the Prior Cancellation Proceeding was dismissed with prejudice. Unlike in *S Industries*, the USPTO issued the Combined Notice of the Declaration on March 26, 2010 over eight months **before** the Board dismissed the Prior Cancellation Action on December 14, 2010. Petition to Cancel, ¶¶ 19, 37. Although Petitioner insists it did not have notice of the Combined Declaration such that it “could have raised” its claim of fraud in the Prior Cancellation Proceeding, Petitioner had at least constructive notice or inquiry notice of it when the USPTO issued its public record of the Combined “Notice” of the Declaration. *See* Petition to

⁵ The Board may take notice of filings in other TTAB proceedings. *The Urock Network*, 115 U.S.P.Q.2d 1409, at *6 n.10 (TTAB 2015) (citing *Kraft, Inc. v. Balin*, 209 USPQ 877, 881 n.8 (TTAB 1981)).

Cancel, ¶37; *see also In re Shell Oil Co.*, 992 F. 2d 1204, 1207 n.3 (Fed. Cir. 1993) (the Board may take judicial notice of agency action relating to declarations under Sections 8 and 15, since it is an adjudicative fact of a “public record”). A party is charged with “constructive notice” of a public record of a registration on the principal register. *Bridgestone/Firestone Research Inc. v. Automobile Club de l'Ouest de la France*, 245 F.3d 1359, 1362 (Fed. Cir. 2001); *Teledyne Technologies, Inc. v. Western Skyways, Inc.*, 78 U.S.P.Q.2d 1203, at *9 (TTAB 2006). Further, a party’s “constructive or inquiry notice” of publicly recorded documents “renders any claims stemming from these documents as barred by res judicata, as such claims could have and should have been brought” in the first action. *See Carlisle v. Matson Lumber Co.*, 186 F. App’x 219, 224 (3d Cir. 2006).

Since the Combined Notice was a public record relating to the Registration for which Petitioner was actively seeking to cancel at the time in both the Civil Action and the Prior Cancellation Proceeding, Petitioner clearly had at least constructive or inquiry notice of the Combined Declaration for over eight months before the Board dismissed the Prior Cancellation Proceeding with prejudice. *See* Petition to Cancel, ¶¶ 19, 37. In fact, the Board even issued an order roughly five months after the Combined Notice that instructed Petitioner to amend its petition to cancel from the Prior Cancellation Proceeding for other grounds. *See* Petition to Cancel, ¶37; Cancellation No. 92045947, TTABVue No. 42. The Board then issued a subsequent order for Petitioner to show cause why the Prior Cancellation Proceeding should not be dismissed with prejudice. Cancellation No. 92045947, TTABVue No. 44. Instead of taking any action, however, Petitioner had an “apparent loss of interest,” and the Board dismissed its Prior Cancellation Proceeding with prejudice. Cancellation No. 92045947, TTABVue No. 45. Petitioner therefore easily “could have” amended its petition to include the claim raised in the present Petition to Cancel. As a result, Petitioner’s claim for fraud is precluded under the doctrine of res judicata.

IV. CONCLUSION

Based on the foregoing, Registrant respectfully requests that the Board dismiss the Petitioner’s Petition to Cancel.

Respectfully submitted,

PROCOPIO, CORY, HARGREAVES
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Dated: October 14, 2015

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GREAT CONCEPTS, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing GREAT CONCEPTS, LLC'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS CHUTTER, INC.'S PETITION TO CANCEL UNDER FED.R.CIV.P. 12(b)(6) is being mailed via United States mail, postage prepaid and sent electronically, on October 14, 2015 to the counsel for Registrant as follows:

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Dated: October 14, 2015

By: /Lisel M. Ferguson/
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